No. _____

In The
Supreme Court of the United States

DAVID BENOIT MECH, d/b/a
THE HAPPY/FUN MATH TUTOR,

Petitioner,

v.

SCHOOL BOARD OF PALM
BEACH COUNTY, FLORIDA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the decision in *Walker v. Texas Division, Sons of Confederate Veterans, Inc*., ___ U.S. ___, 135 S. Ct. 2239 (2015), allow the government to place an imprimatur on private advertising and thereby render the advertisement government speech, stripping it of all First Amendment protection?

PARTIES TO PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

All parties to the proceedings are listed below:

David Benoit Mech, d/b/a The Happy/Fun Math Tutor, *Petitioner*.

The School Board of Palm Beach County, Florida, *Respondent*.

The ACLU of Florida, amicus below, is a nonprofit corporation and has no stock. There is no parent or publicly held company owning 10% or more of the corporation's stock.

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INTRODUCTION

This case presents the scenario that Justice Alito and three other dissenting Justices feared in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, ___ U.S. ___, 135 S. Ct. 2239 (2015):

> . . . Suppose that a State erected electronic billboards along its highways. Suppose that the State posted some government messages on these billboards and then, to raise money, allowed private entities and individuals to purchase the right to post their own messages. And suppose that the State allowed only those messages that it liked or found not too controversial. Would that be constitutional?
>
> What if a state college or university did the same thing with a similar billboard or a campus bulletin board or dorm list serve? What if it allowed private messages that are consistent with prevailing views on campus but banned those that disturbed some students or faculty? Can there be any doubt that these examples of viewpoint discrimination would violate the First Amendment? I hope not, but the future uses of today's precedent remain to be seen.

Id. at 2254-56 (Alito, J., dissenting).

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals for which review is sought is reported at 806 F.3d 1070 (11th Cir. 2015). (App. 1-18). That opinion affirmed the district court's order on summary judgment (App. 25-40) as well as the district court's decision on Mech's motion to amend judgment. (App. 21-24).

BASIS OF JURISDICTION

The Eleventh Circuit entered the judgment below on November 23, 2015. (App. 19-20). The court denied a timely petition for rehearing and rehearing *en banc* on January 19, 2016. (App. 41-42).

On April 8, 2016, Justice Thomas granted Petitioner an extension of time to file his Petition for Writ of Certiorari to May 18, 2016. This petition is timely filed.

Jurisdiction is based upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, Section 1.

STATEMENT OF CASE AND PROCEEDINGS

Petitioner David Mech a/k/a The Happy/Fun Math Tutor ("Petitioner" or "Mech") sued the School Board of Palm Beach County, Florida, for violating his First and Fourteenth Amendment rights when three of the County's public schools removed Mech's math tutoring business banner advertisements from their fences.

In 2008, the School Board – which oversees the Palm Beach County School District – adopted a pilot program for its schools to hang banners on their fences to recognize the sponsors of school programs. The banner program was codified in 2011 as Policy 7.151, "Business Partnership Recognition – Fence Screens." Subsection (1) of the Policy states its purpose:

> Purpose. – The District recognizes that athletic sponsors and other business partners

> provide a vital role in sponsorship of key programs within our schools. As such, schools have increased needs to visibly recognize these partners in the community. In the interests of community aesthetics and in consideration of local ordinances that may prohibit or restrict banners and advertising, these uniform standards have been developed. By permitting the recognition of business partners on school campuses, it is not the intent of the School Board to create or open any Palm Beach County School District school, school property or facility as a public forum for expressive activity, nor is it the intent of the School Board to create a venue or forum for the expression of political, religious, or controversial subjects which are inconsistent with the educational mission of the School Board or which could be perceived as bearing the imprimatur or endorsement of the School Board.

Id. at 7.151(1). Mech complied with the requirements for the banner ad program, and the schools hung his banner advertisements on their fences.

The schools subsequently removed the banners, however, after some parents complained upon discovering that Mech's tutoring business shared a mailing address at a private postal center with his former adult media business, Dave Pounder Productions. The schools informed Mech that his "position with Dave Pounder Productions, together with the fact that Dave Pounder Productions utilizes the same address as The Happy/Fun Math Tutor creates a

situation that is inconsistent with the educational mission of the Palm Beach County School Board and the community values." *Mech v. Sch. Bd. of Palm Beach Cty*., 806 F.3d 1070, 1072-74 (11th Cir. 2015).

The district court entered summary judgment against Mech on the ground that since the schools did not remove the banners due to their content, no First Amendment violation had occurred. App. 25-40. The district court's ruling failed to address Mech's core claims, which were rooted not in the content of the banner, but in the censorship of his speech based on his viewpoint and identity, which resulted from the unbridled discretion afforded by the School Board's Policy.

The Eleventh Circuit panel affirmed, but on a different ground. Citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009), the court concluded that the Free Speech Clause of the First Amendment does not protect Mech because the banner advertisements contained the tagline "Partners in Excellence" and thus constituted "government speech." *Mech*, 806 F.3d at 1072. Prior to its decision, the Eleventh Circuit had ordered supplemental briefing after *sua sponte* raising the question of whether the banners were government speech under the recently decided *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, ___ U.S. ___, 135 S. Ct. 2239 (2015). Neither party in either their original or supplemental briefs had argued that the speech was government speech. *See* oral argument at http://mechforpbcschools.com/lawsuit.html or

https://www.youtube.com/watch?v=878jhF4m0Ro The issue was likewise not briefed or factually developed in the district court.

The Eleventh Circuit held that the banner advertisements constituted government speech even though indicia of private advertising predominate, in that: 1) the advertisers own the banners; 2) School Board officials acknowledged that the banners are advertising; 3) the banners have private logos of the sponsored business prominently displayed with corporate colors; 4) the location of the banners varies depending upon the size of the contribution; 5) local governments commonly regulate the size and location of private signs; 6) the banners contain contact information exclusively for the private business; 7) the banners are not permanent; 8) the banners are not government IDs or monuments; 9) the history of banner ads is brief rather than longstanding; and 10) the advertisers pay a fee in exchange for their banners being displayed for a fixed period of time. Notably, the School Board never claimed in its answer or supplemental briefs, *even when invited to do so during oral argument*, *id*. (oral argument at 0:55-1:22, 24:38-26:38, and 27:26-27:42), that the "Partners in Excellence" taglines were its own (i.e., government) speech. Further, neither School Board Policy 7.151(2)(h) nor protocol requires principals to conduct criminal or background checks on businesses with whom the District partners. Thus, there is no vetting of purported "partners" for their "excellence." The only real criterion

for becoming a "partner" is that the business pay money for its ads.

The Eleventh Circuit's ruling that Mech's banners constituted "government speech" under *Walker* was based on an incomplete record, since the issue of government speech was never litigated or factually developed in the district court.

Mech filed a Petition for Rehearing and Rehearing *En Banc*. App. 68. On January 19, 2016, the circuit court denied Rehearing and Rehearing *En Banc*.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW PRESENTS THE IMPORTANT UNANSWERED QUESTION POSED BY THE FOUR DISSENTERS IN *WALKER V. TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC.*, ___ U.S. ___, 135 S. CT. 2239 (2015).

In *Walker*, this Court determined that specialty license plates issued by the State of Texas were government speech and that the State's denial of a Confederate Flag plate was therefore not subject to First Amendment scrutiny. *Walker*, 135 S. Ct. at 2244-45. In so holding, this Court concluded that because (1) the States have historically used license plates to communicate with the public, (2) license plates are often closely identified in the public's mind with the State, and (3) Texas effectively controlled the expressive content of the license plates by exercising

final approval authority over submitted designs, Texas' specialty plates "are similar enough to the monuments in *Summum* to call for the same result." *Walker*, 135 S. Ct. at 2249. *Walker* acknowledged, however, that its holding applied only in limited circumstances, noting the unusually close connection between license plates and State directives. *Id*. at 2251. *Walker* held that license plates are government speech because they are government items serving governmental purposes of vehicle registration and identification, are required by law for every Texas vehicle owner, are issued by the State, and are, "essentially, government IDs." *Id*. at 2249.

The Eleventh Circuit found *Walker* dispositive for two reasons. First, it held that "observers reasonably believe the government has endorsed the message[s]" because they were hung on school fences. *Mech*, 806 F.3d at 1076. Second, it held that because the schools control "the design, typeface, [and] color" of the banners, *id.* at 1078 (quoting *Walker*, 135 S. Ct. at 2249), "and require the banners to include the school's initials and the message 'Partner in Excellence,'" *id.*, the banners are government speech. The circuit court's reasoning is faulty because it disregards the narrow and limited nature of this Court's 5-to-4 decision in *Walker*.

Unlike the license plates at issue in *Walker*, the banner advertisements here are not government IDs over which the School Board exercises absolute control over language or design. Nor do they have the history as government speech found so significant in *Walker*. And while the circuit court's decision places

great weight on the language "Partners in Excellence," this statement is nothing more than a passing reference to the paid affiliation with the school that permitted the placement of the banner. Also, while license plates are required on all motor vehicles, schools are not required to have banner ad programs, nor are businesses required to advertise on school fences.

The danger of expanding *Walker*'s limited holding that government-issued license tags are government speech was cogently framed by Justice Alito in his dissent (joined by Chief Justice Roberts, and Justices Scalia and Kennedy) in *Walker*:

> **The Court's decision passes off private speech as government speech and, in doing so, establishes a precedent that threatens private speech that government finds displeasing.** Under our First Amendment cases, the distinction between government speech and private speech is critical. The First Amendment "does not regulate government speech," and therefore when government speaks, it is free "to select the views that it wants to express." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-468, 129 S. Ct. 1125, 172 L.Ed.2d 853 (2009). By contrast, "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another. *Rosenberger v. Rector and Visitors of Univ.of Va.*, 515 U.S. 819, 828, 115 S. Ct. 2510,132 L.Ed.2d 700 (1995). Unfortunately, the Court's decision categorizes private speech as government speech and

thus strips it of all First Amendment protection. . . .

. . . **Suppose that a State erected electronic billboards along its highways. Suppose that the State posted some government messages on these billboards and then, to raise money, allowed private entities and individuals to purchase the right to post their own messages. And suppose that the State allowed only those messages that it liked or found not too controversial. Would that be constitutional?**

What if a state college or university did the same thing with a similar billboard or a campus bulletin board or dorm list serve? What if it allowed private messages that are consistent with prevailing views on campus but banned those that disturbed some students or faculty? Can there be any doubt that these examples of viewpoint discrimination would violate the First Amendment? I hope not, but the future uses of today's precedent remain to be seen.

135 S. Ct. at 2254-56 (emphasis added).

The decision below merits review because it will have broad ramifications, enabling the government to convert private speech in a limited or nonpublic forum into government speech unprotected from censorship, viewpoint or speaker-identity discrimination, and

unconstitutional conditions.[1] The decision affords the government unbridled discretion over both speech and speakers merely by adding a meaningless and sham seal of approval or, in this case, a "thank you" message (i.e., "Partner in Excellence"). In fact, the circuit court's reasoning offers a roadmap for turning every sign on government property into government speech by adding a perfunctory seal of approval, and it could be extended even to spoken words in a nonpublic forum – e.g., a sign at the entrance to the building stating that the government has approved the speaker.

In short, the circuit court's decision represents a stark departure from the narrowly-defined realm of government speech delineated in *Walker* and permits the government to avoid any constitutional scrutiny of its actions merely by affixing a meaningless affiliation to private speech and advertising.

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[1] Even under the federal government's crimped view of the unconstitutional conditions doctrine taken in its Petition for Writ of Certiorari in *In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015), *petition for cert. filed sub nom. in Lee v. Tam*, (April 20, 2016) (No. 15-1293), it conceded that the "doctrine would apply, for example, if the Lanham Act denied the benefits of trademark registration to persons who had engaged in specified speech or conduct outside the registration program (e.g., if respondent's use of THE SLANTS as a mark in commerce rendered him ineligible to register other marks)." Petition for Writ of Certiorari filed in *Lee v. Tam*, No. 15-1293, at 17. So, too, has Mech been denied the benefits of the banner ad program because he engaged in disfavored speech or conduct outside the banner ad program.

II. THE DECISION BELOW CONFLICTS WITH *WALKER* AND *IN RE TAM*, 808 F.3D 1321 (FED. CIR. 2015), *PETITION FOR CERT. FILED SUB NOM. IN LEE V. TAM*, (APRIL 20, 2016) (NO. 15-1293) WHICH LIMIT THE APPLICABILITY OF THE GOVERNMENT SPEECH DOCTRINE.

The Eleventh and Federal Circuits are split on whether attaching a government label to retail marketing material renders the speech governmental. The Eleventh Circuit held that it did; the Federal Circuit held to the contrary.

The decision below conflicts with this Court's decision in *Walker* and circuit courts that limit the applicability of the government speech doctrine to situations where: 1) the government has long been using the speech as a means of expressing a government message; 2) the speech is closely identified in the public's mind with the government; and 3) the government controls the message.

In *In re Tam*, 808 F.3d 1321, the Federal Court of Appeals, sitting *en banc*, rejected the government's argument that trademark registration "and the accoutrements of registration – such as the registrant's right to attach the ® symbol to the registered mark, the mark's placement on the Principal Register, and the issuance of a certificate of registration – amount to government speech." *Id*. at 1343.

"The logical extension of the government's argument is that these indicia of registration convert the

underlying speech into government speech unprotected by the First Amendment. Thus, the government would be free, under this logic, to prohibit the . . . registration of any work deemed immoral, scandalous, or disparaging to others. This sort of censorship is not consistent with the First Amendment or government speech jurisprudence." *Id*. at 1346.

"The vast array of private trademarks are not created by the government, owned . . . by the government, sized and formatted by the government, immediately understood as performing any government function (like unique, visible vehicle identification), aligned with the government, or (putting aside any specific government secured trademarks) used as a platform for government speech. There is simply no meaningful basis for finding that consumers associate registered private trademarks with the government." *Id*.

Accordingly, the court held that trademark processing "no more transforms private speech into government speech than when the government issues permits for street parades, . . . grants . . . licenses, or records property titles, birth certificates, or articles of incorporation. To conclude otherwise would transform every act of government registration into one of government speech and thus allow rampant viewpoint discrimination. When the government registers a trademark, it regulates private speech. It does not speak for itself." *Id*. at 1348.

The Federal Circuit's reasoning is pertinent to Mech's argument that the private advertisements that

appear on school fences are not created by the schools, owned, designed or formatted by them, understood as performing any school function, or used as a platform for government speech, and thus are not government speech. Accordingly, the Eleventh Circuit's decision in this case is in conflict with *In Re Tam*, which finds speech of a similar nature to constitute private, not government, speech. Certiorari review is therefore appropriate to resolve the split in the circuits on this important constitutional issue.

Additionally, given the significant impact of the government speech doctrine on the protections otherwise afforded private speech, certiorari review is warranted on that independent basis.

CONCLUSION

The Eleventh Circuit's decision, if left standing, would allow the government to strip private speech of all First Amendment protection merely by adding a *pro forma*, ambiguous statement of approval. If allowed to stand, the decision threatens to undermine well-established constitutional jurisprudence in the free speech realm, by allowing the School Board to rubber stamp traditionally private speech and thereby strip protected expression of fundamental First Amendment safeguards.

The petition for certiorari should be granted to resolve the circuit court split and to clarify the limits of *Walker*. If this Court grants certiorari in *In re Tam*,

then at the very least, this case should be held for disposition in light of *In re Tam*. If *In re Tam* is affirmed, the Court should grant this petition, vacate and remand.

Respectfully submitted,

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